90-1363

No. 91-____

FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October, 1991

LABORERS' LOCAL 332,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Dated: February 19, 1991

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QUESTION PRESENTED

(1) Whether the Labor Management Relations Act requires the National Labor Relations Board to issue Findings of Fact and Conclusions of Law after a hearing on an unfair labor practice charge.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Laborers' Local 332 is a chartered local union of the Laborers' International Union of North America. Petitioner filed a Cross Petition for Review of the Order of the National Labor Relations Board to the Third Circuit Court of Appeals.

Respondent is the National Labor Relations Board which applied to the Third Circuit Court of Appeals for enforcement of its Order of July 24, 1989.

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IN THE

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LABORERS' LOCAL 332,

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v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Laborers' Local 332 ("Local 332"), respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered in the proceeding titled National Labor Relations Board v. Laborers' Local 332, Nos. 90-3270 and 90-3307, on November 21, 1990.

OPINIONS BELOW

The Judgment of the United States Court of Appeals issued on November 21, 1990, is reproduced in the Appendix hereto at A-1. The Court did not issue an Opinion.

The Decision and Order of the National Labor Relations Board, issued on July 24, 1989, is reproduced in the Appendix hereto at A-3.

The Decision and Statement of the Case of the Administrative Law Judge of the National Labor Relations Board is reproduced in the Appendix hereto at A-6.

JURISDICTION

The Decision of the Court of Appeals was issued on November 21, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

This action involves questions under the Labor-Management Relations Act, 29 U.S.C. §160.

STATUTORY PROVISION OF THE THE LABOR-MANAGEMENT RELATIONS ACT

29 U.S.C. §160. Prevention of unfair labor practices—Powers of Board generally. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. . . (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have the power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof,. . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28. (c). . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice. . . (e) The Board shall have the power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such

person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order,.... The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . .

I. STATEMENT OF THE CASE

This case arises out of an unfair labor practice charge against Petitioner Local 332. The charge was filed on June 5, 1988, against the Union and a Construction Company (the employer) by a member of a brother Local Union who claimed that the shop steward of Local 332 had encouraged a foreman on a construction site to discriminate against the complainant, in violation of Section 8(a)(3), and 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. §151-69.

The Union denied all charges against it, and answered that the company had acted on its own in discharging the complainant. Just prior to the hearing on the complaint, the employer settled the case against it and the hearing against the Union alone proceeded before an Administrative Law Judge. At the hearing, testimony was taken from the complainant, the shop steward, the foreman and the business agent of the Local to which the complainant belonged. Proposed Findings of Fact and Law were submitted by counsel for the National Labor Relations Board ("the Board") and the Union. On March 3, 1989, the Administrative Law Judge rendered a decision against the Union with Findings of Fact and Conclusions of Law. The Union filed Exceptions to the Judge's Findings of Fact, with specific references to the objectionable facts. Respondent's arguments in its brief and exceptions to the Administrative Law Judge's Opinion were that there was insufficient evidence to support the conclusion that the Union had violated the Act; and that the Judge had based his decision on improper speculation and illogical deductions, and by doing so the Judge altered and added to a record which otherwise failed to prove the charges against the Union. Respondent argued that without more substantiation of the Board's ruling, *i.e.*, without Findings of Fact and Conclusions of Law, the Respondent's appellate rights

would be prejudiced. A three member panel of the Board affirmed the Judge's rulings, findings and conclusions in a one sentence ruling that stated: "The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings and conclusions. . ." Respondent Union then filed a Motion for Reconsideration requesting *inter alia* findings of fact and conclusions of law to support the Board's ruling.

The Motion for Reconsideration was not accepted for decision by the Board because it was filed one day late. Upon request, the Board refused to reconsider its decision not to reconsider the motion.

After notification to the General Counsel's office that the Union would not comply with the Board's Order, a Petition for Enforcement was filed by the Board and respondent filed a Cross-Petition for Review. The Court of Appeals had jurisdiction under Section 10(e) of the National Labor Relations Act, 29 U.S.C. §160(e). The Court of Appeals granted the Board's Petition for Enforcement and denied the Union's Petition for Review, without an opinion on November 21, 1990.

REASONS FOR GRANTING THE WRIT

I. THE NATIONAL LABOR RELATIONS BOARD'S FAILURE TO ISSUE ITS OWN FINDINGS OF FACT AND CONCLUSIONS OF LAW WAS AN ABROGATION OF ITS STATUTORY DUTY UNDER THE LABOR-MANAGEMENT RELATIONS ACT. THIS IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The National Labor Relations Board is empowered under the Labor Management Relations Act ("the Act"), 29 U.S.C. §160, to enforce prohibitions of the Act against unfair labor practices. The Board through its General Counsel serves a quasi-prosecutorial function by investigating and, if good cause is shown that an unfair labor practice has occurred, prosecuting an unfair labor practice charge. The hearing on the charge is

traditionally held before an Administrative Law Judge who acts as a trial examiner, and who is required to conduct the hearing, as far as practicable, in accordance with the rules of evidence applicable in the district courts of the United States. 29 U.S.C. §160(b). The hearing is, therefore, more informal than a judicial proceeding where the rules of evidence are strictly applied.

The Act sets out the standard of proof required before a finding of an unfair labor practice charge can be reached. If the Board concludes by a preponderance of the evidence that a person has engaged in an unfair labor practice, it "shall state its findings of fact" and order the person to cease such activity. 29 U.S.C. §160(c). The Board's orders are not self-enforcing and the Act authorizes enforcement by any Court of Appeals of the United States. The appellate court's scope of review of the findings of the Board with respect to questions of fact is to ensure that the Board's findings are supported by substantial evidence on the record considered as a whole. 29 U.S.C. §160(e). If the Board's findings of fact are so supported they are deemed conclusive. Courts have consistently interpreted this section to mean that the Board's findings of fact are accorded great deference. *N.L.R.B.* v. *Baptist Hospital, Inc.*, 442 U.S. 773 (1979), *Ona Corp.* v. *N.L.R.B.*, 729 F.2d 713 (11th Cir. 1984), *Midwest Solvents, Inc.* v. *N.L.R.B.*, 696 F.2d 763 (10th Cir. 1982).

Notwithstanding this deference, the appellate courts' function of review must extend beyond what has been called by Mr. Justice Frankfurter, the mere "judicial echo of the Board's conclusion." *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 491 (1951). In his discussion of the appellate courts' scope of review of the Board's decisions, Mr. Justice Frankfurter, with great clarity, outlined the legislative history of the Labor Management Relations Act, and the judicial interpretation of the standard of proof requirements of the Act. The "substantial evidence" requirement hereinbefore referenced was said to be "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *id.*, 340 U.S. at 477. And the evidence of the whole record must be considered, not just the evidence supporting the Board's conclusion. Justice Frankfurter opines in *Universal*

Camera that the substantial evidence test is in fact not a tight control over the essentially administrative process of the N.L.R.B., but that it is nevertheless the applicable standard of proof, and that for judicial review to be meaningful, this standard must be and should be applied strictly and to the entire record. What is implicit in the mandate to the appellate courts is that they examine the Board's findings to ensure that the findings are above relying on "suspicion, surmise, implications, or plainly incredible evidence." *id.*, 340 U.S. at 484.

Because the evidentiary process in the Board's hearing is relaxed and the hearings are conducted and prosecuted by the Board, it is imperative that the Board appear impartial in its decision, and substantiate its review of the trial examiner's findings. The Board has the obligation to build a record and to make fact determinations; it cannot relegate its duties to the trial examiner. *N.L.R.B. v. Coletti*, 387 F.2d 298 (2d Cir. 1967). The petitioner asked the Board in the instant case to review the inferences drawn by the trial examiner, inferences which were, in the Union's view, totally unsupported by the evidence. The Union was not asking the Board to overrule the Judge's credibility findings. If the Board had issued its own findings of fact, the Union would have had notice of whether the Board drew the same inferences and whether the trial examiner's conclusions based on those inferences were proper.[1]

A person seeking review of a trial examiner's findings by a Board or any other body cannot have meaningful review unless the Board carries out its responsibility to issue findings of fact. If it merely issues a perfunctory statement, as it did in the instant case, that it affirms the Judge's rulings, findings and conclusions, the appellant must continue to speculate as to what the Board based its decision on, and/or whether the Board's decision was rationally related to the evidence. To require an individual to go through the exercise of submitting Exceptions to a Judge's Decision and then to not rule on the Exceptions in any

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1. As this Court has pointed out, inferences are not proof, and a judicial review of the Board's findings must encompass a review of inferences fairly and/or unfairly drawn. *N.L.R.B. v. Baptist Hospital, supra.* We submit that the same principle is applicable to the Board's review.

meaningful way is depriving the appellant of his/her due process rights.[2] The potential evils of the administrative process: arbitrariness, irrationality, bias, and rubber-stamping, which the decisions interpreting the scope of review of the Labor Management Relations Act sought to eradicate, are surely alive in this case and similar cases that are disposed of so cavalierly by the Board.

When the Board disagrees with the trial examiner's findings it issues its own findings of fact. In these cases, by issuing its own findings, the Board creates a record which the Court relies on in carrying out its duty to enforce the Board's order. The record enables the Court to pass intelligently on the (Board's) decision and to determine whether it is rationally related to the evidence. *N.L.R.B. v. Coletti, supra*. We submit that the entire review process in Board proceedings depends on the Board's issuance of its own Findings of Fact. And that if there are no Findings of Fact by the Board, judicial review becomes a shallow process and deprives a party seeking review of due process rights. There is no sound reason why the Board should not issue its Findings in every case. As this Court has said, the Act demands respect for the judgment of the Board as to what the evidence proves. But the Court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. *N.L.R.B. v. Indiana & Michigan Electric Co.*, 318 U.S. 9 (1943). In order for the Court to ensure that the policies of the Act are being adhered to, and that due process rights of the parties are protected, the Board must fulfill its statutory responsibilities. It did not do so in this case and was not required to do so by the appellate court. This Court has not addressed this specific issue which is an important question of federal law which should be settled by this Court.

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2. We note that the Board did address and grant the Exceptions of the General Counsel with respect to conforming the language of the Judge's Order and other matters.

CONCLUSION

For the reasons stated above, Laborers' Local 332 respectfully urges the Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

RONALD A. WHITE, P.C.

MARILYN MONACO
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Philadelphia, PA 19103
(215) 790-4500

Attorneys for Petitioner
Laborers' Local 332

Dated: February 19, 1991

CERTIFICATION OF BAR MEMBERSHIP

I, Marilyn Monaco, Esquire, certify that I have made application to the Bar of the Supreme Court of the United States and expect to be admitted by February 19, 1991.

Marilyn Monaco

MARILYN MONACO

CERTIFICATE OF SERVICE

I hereby certify that on this date, February 19, 1991, the Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit was served on all parties, by first class United States mail, postage pre-paid, addressed as shown below:

The Honorable Kenneth W. Starr
Office of the Solicitor General
DEPARTMENT OF JUSTICE
10TH & Constitution Avenue, N.W.
Room 5143
Washington, DC 20530

Aileen A. Armstrong, Esquire
Paul J. Spielberg, Esquire
Joseph J. Jablonski, Jr., Esquire
NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel
1317 Pennsylvania Avenue, N.W.
Washington, D.C. 20570
Attorneys for Respondent — National Labor Relations Board

Marilyn Monaco

MARILYN MONACO

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3270 and 90-3307

NATIONAL LABOR RELATIONS BOARD,
Petitioner in No. 90-3270

vs.

LABORERS LOCAL 332
(D'ANGELO BROTHERS, INC.)
Respondent

NATIONAL LABOR RELATIONS BOARD,
Respondent

vs.

LABORERS' LOCAL 332
(D'ANGELO BROTHERS, INC.),
Petitioner in No. 90-3307

PETITION FOR ENFORCEMENT
AND PETITION FOR REVIEW OF AN
ORDER OF THE NATIONAL LABOR RELATIONS BOARD
(Board No. 4-CB-5652)

Submitted under Third Circuit Rule 12(b)6
November 15, 1990

Before: STAPLETON, HUTCHINSON, and GARTH,
Circuit Judges

JUDGMENT ORDER

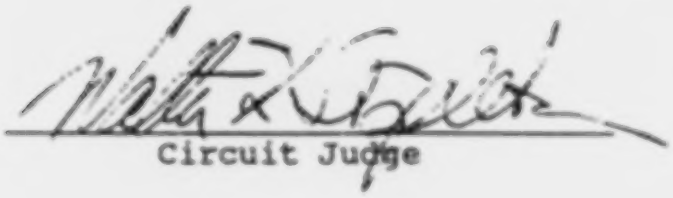
After consideration of the contentions raised by petitioner and respondent, it is

ORDERED AND ADJUDGED that the Petition for Enforcement of the Order of the National Labor Relations Board dated July 24, 1989, be and hereby is granted, the Petition for

Review of said Order is hereby denied, and the Order of the Board is hereby enforced.

Costs are taxed against Laborers Local 332.

BY THE COURT,



Circuit Judge

ATTEST:

Clerk

Dated: Nov. 21, 1990

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LABORERS LOCAL 332
(D'Angelo Brothers, Inc.)
and
DAVID FOSTER, an Individual

Case 4–CB–5652

DECISION AND ORDER

On March 3, 1989, Administrative Law Judge Thomas A. Ricci issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified[2] and set forth in full below.

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1. The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In part III, at par. 13, the judge inadvertently referred to Local 332 as Local 420.

2. We grant the General Counsel's exceptions pertaining to omissions of standard language in the judge's recommended Order and notice. We shall also provide the customary "in any like or related" injunctive language in the recommended Order and notice. Finally, we shall conform the judge's Conclusions of Law, recommended Order, and notice with his findings.

The judge did not recommend a reinstatement order because the Employer had offered reinstatement. Foster declined the offer because he had found employment elsewhere. The judge's recommended make-whole remedy should therefore run only from the date of discharge until the reinstatement offer. Because the record is unclear when the offer of reinstatement was made, we leave to the compliance stage of the proceeding that determination.

Amended Conclusions of Law

Substitute the following for Conclusion of Law 1.

"1. By informing Foster that he could not work because he was not a member of the Respondent, and by causing D'Angelo Brothers, Inc., to discharge Foster because he was not a member of the Respondent, the Respondent has violated and is violating Sections 8(b)(1)(A) and 8(b)(2) of the Act."

ORDER

The National Labor Relations Board orders that the Respondent, Laborers Local 332, Philadelphia, Pennsylvania, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Informing any employee that he cannot work because he is not a member of the Respondent, and causing D'Angelo Brothers, Inc., or any other employer, to discharge any employee for the sole reason that he is not a member of the Respondent.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify D'Angelo Brothers, Inc., in writing, and furnish a copy of such notification to David Foster, that it has no objection to his employment in any job assignment.

(b) Make whole David Foster for any loss of earnings and other benefits he may have suffered because of the Respondent having caused him to be discharged from his regular employment, with interest as provided in the judge's recommended Order.

(c) Post at its offices and meeting halls copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent union immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notice to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Forward to the Regional Director for Region 4 signed copies of the notice for posting by D'Angelo Brothers, Inc., at its Philadelphia, Pennsylvania office and jobsites, if it is willing.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. July 24, 1989

James M. Stephens, Chairman

Mary Miller Cracraft, Member

John E. Higgins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

3. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LABORER'S LOCAL 332
and
DAVID FOSTER, An Individual

Case No. 4–CB–5652

Susan Stahl, Esq., of Philadelphia, PA, for the General Counsel.
Marilyn Monaco, Esq., and *Ronald White*, Esq., of *White, McClennan & Singley*, of Philadelphia, PA. for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, A. L. J.: A hearing in this proceeding was held at Philadelphia, Pennsylvania, on December 8, 1988, on complaint of the General Counsel against Laborer's Local 332, here called the Respondent. The complaint issued on July 29, 1988, upon a charge filed on June 15, 1988, by David Foster, an Individual, here called the Charging Party. The sole issue presented is whether the record evidence is sufficient to support the allegation that the Respondent Union caused the discharge of the Charging Party from his employment because he was not a member of the Respondent Union, and thereby violated Section 8(b)(1) and 8(b)(2) of the Act. Briefs were filed by the General Counsel and the Respondent.

Upon the entire record and from my observation of the witnesses I make the following:

Findings of Fact

I. The Business of the Employer

D'Angelo Brothers, Inc., the employer involved in this case, is a Pennsylvania corporation engaged in commercial building construction with its principal place of business in Philadelphia. During the one year period preceding issuance of the complaint in the course of its business operations this company purchased and received goods and materials valued in excess of $50,000 directly from suppliers outside the state of

Pennsylvania. I find that this employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

I find that Laborer's Local 332 is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practice

This is a very simple case. David Foster, the Charging Party, works in the construction industry as a laborer, and has been for eight years a member of Laborer's Local 420 in Philadelphia. In June of 1988 Harold Anderson, a foreman on a construction job being run by D'Angelo Brothers, Inc., needed laborers and asked his then employees to help him find some others. Somebody telephoned Foster, who came to see Anderson on the job. Anderson told Foster he would be considered, and that same day telephoned him at home, asking him to report for work the next morning. Foster came the next day at 7:00 a.m., and worked all day. The next morning, when he arrived for work, he was fired, his paycheck for the previous day all ready upon his early arrival.

On this job site, where the employer had people working from February to September of 1988 when the job finished, the laborer's were practically all members of Laborers Local 332 and Laborer's Local 57. There is no evidence on this record that there was any collective-bargaining contract in effect between the company and either of these two locals that applied to this work project. One of the laborer employees, David Pellicciotti, was a member of Local 332 and its steward on the job. He testified that among his duties as steward "I check union cards . . . If there a new face on the job, I just ask him for his union card and then I write it down in my book and then make sure he's paid up. . . ."

There is a conflict in testimony between Foster and Pellicciotti as to what was said when the steward asked to see the man's union card. We start with the critical part of Pellicciotti's story: "I saw Mr. Foster . . . And I asked him if he was a laborer

and he said yes . . . and I says 'Can I see your union card?' . . . and he says 'yeah'. So I look at the union book and I says, 'I see you're out of 420.' and he says, 'Yes . . . Mr. Anderson was about 8 or 10 feet away from us . . . so I walked over to Mr. Anderson. And I said 'I would appreciate it next time if you would let me get the guys on the job because it kinda of makes me look good and there's a lot of guys down our hall who are out of work . . . . I said, 'well, he's out of 420' ".

Foster's testimony is different. He recalled the steward asking for his union card, and that his answer was that he was from Local 420. "And he said no, you can't work on this job, if you're a laborer 420". At this point Pellicciotti went to the foreman and the two returned to Foster.

Foster's testimony continues: "The foreman say, 'You from 420?': He said, 'your local guys are cutting me in court': And he said, 'I'll probably get in trouble if I let you work here'. "So he told me to come the next day and he would see what he could do".

When Foster came to work the next morning, as he testified, "They told me they couldn't use me no more, because I was a laborer from 420".

The foreman, Anderson, testified as follows: "Denny [Pellicciotti approached me to inform me that he was in 420 . . . I realized that it was the same union that I had a lawsuit with D'Angelo Brothers, and I asked Mr. Foster, like 'you should have told me. You're going to get me in a lot of trouble . . . and then I suggested that he try getting in 332 because he liked doing our type of work, and he just said that he had tried and it didn't work. Q. You told Mr. Foster to come back the next day? A. I did. Q. Did you tell him that he would be employed the next day? A. Yes. I did. Well, I told him to come back, that he had a job. Implying that he would be employed".

Anderson also testified that later that evening, when he reported all this to his superior, he was told "that we had people from another job coming, that had been our specialists in underpinning. and we wouldn't need Mr. Foster and that he should be laid off".

The next morning Anderson discharged Foster with the statement, "that we didn't have anything for him". As set out

above, a few days later the Company called Foster back to work, but he had already found other employment.

I start with Anderson's testimony. He clearly tried to create the impression that his annoyance with Foster being a Local 420 member was because of some sort of litigation going on between the company and that particular union. The next day he shifted ground and told the man he was fired because he was not needed. This last statement — repeated at the hearing by saying Foster was let go because others was being employed in his place — is not true. If in fact Foster was to be used only one day on this job, Anderson would hardly have hired him at all, at least he would have told him about that short term when he came. Moreover, why have that man report to work the next day if he really was to be let go? And finally, only a few days later Anderson called Foster back to work. Anderson was not a credible witness, and on this record, I cannot find in fact that Foster was discharged for reasons apart from Pellicciotti's talk with Anderson at the end of Foster's first day at work.

As to the conflict in testimony between Foster and the steward, I credit Foster. Against Anderson's direct testimony that Pellicciotti told him Foster was "in 420", the witness equivocated, first saying, "I didn't point it out specifically," and then adding that it was only after Anderson told him that Foster was "from 332," that he corrected the foreman.

It was Pellicciotti's admitted responsibility to see to it that members of his local, and Local 57, worked on this job, and not other people. That is why he asked to see Foster's union card in the first place. He also admitted telling the foreman he should not have hired people from other local unions. With this overall picture, how can I not believe Foster's statement that Pellicciotti told him straight—out that he could not work on this job? I do not know the exact words the steward used when first talking to Anderson, but the first thing out of the foreman's mouth when he came to Foster was that "he would get in trouble if I let you work here." Obviously the ideas then being exchanged between Anderson and Pellicciotti was Foster remaining or not remaining on the job.

The only rational conclusion I can draw from this total record is that Pellicciotti told Anderson that Foster should not

work here because he was not a member of Local 420, and therefore that the company must fire him summarily because the steward had told him that.

I find that by telling Foster that he could not work on this job because he was a member of Laborer's Local 420, Pellicciotti, on behalf of the Respondent Local, violated Section 8(b)(1)(A) of the Act. I also find that causing the employer to discharge Foster on June 7, for the reason that he was not a member of the Respondent Local, the Respondent violated Section 8(b)(2) of the Act.

The Remedy

The Respondent must be ordered to cease and desist from again committing the unfair labor practice here found. It must also be ordered to notify D'Angelo Brothers, Inc., that it has no objection to its rehiring of David Foster. The General Counsel's suggestion that the Respondent also be ordered to reinstate Foster would not be appropriate now because Foster was in fact offered reinstatement but has turned it down. But the Respondent must be ordered to make whole Foster of any loss of pay he may have suffered.

IV. The Effect of the Unfair Labor Practice Upon Commerce

The activity of the Respondent set out in Section 3, above, occurring in connection with the operations of D'Angelo Brothers, Inc., have a close, intimate and substantial relationship to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. By demanding that D'Angelo Brothers, Inc., discharge David Foster because he was not a member of the Respondent Local, and by causing that company to discharge Foster, the Respondent has violated and is violating Section 8(b)(1)(A) and 8(b)(2) of the Act.

2. The aforesaid unfair labor practice affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact and conclusions of law and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[1]

ORDER

The Respondent, Laborer's Local 332, Philadelphia, Pennsylvania, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Demanding of D'Angelo Brothers, Inc., or any other employer, that it discharge any employee for the sole reason that he is not a member of the Respondent local.

(b) In any like or related manner violating Section 8(b)(1)(A) and 8(b)(2) of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Notify D'Angelo Brothers, Inc., in writing, that it has no objection to its hiring David Foster for any employment.

(b) Make whole David Foster for any loss of earnings he may have suffered because of the Respondent having caused him to be discharged from his regular employment, with interest thereon to be computed in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289, and *New Horizons for the Retarded*, 283 NLRB No. 181.

(c) Post at its offices and meeting halls copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by its authorized representatives, shall be posted by the

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1. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

2. In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading, "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Respondent union immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notice to its members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 4 in writing, within 20 days from the receipt of this decision, what steps the Union has taken to comply herewith.

Dated: Washington, DC March 3, 1989

Thomas A. Ricci
Administrative Law Judge